IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NOS. 71 AND 72 OF 2005.

APPEAL FROM ORDER NO.71/2005.

Shri Sunil Vassudev Pednekar,
Bicholim, Goa. .... Appellant.

Versus

Shri Rama Laxman Patkar,
Bicholim, Goa. .... Respondent.

APPEAL FROM ORDER NO. 72/2005.

Shri Sunil V. Pednekar,
Bicholim, Goa. .... Appellant.

Versus

Shri Padmakar C Malgaonkar,
Bicholim, Goa. ..... Respondent.

Shri Shaikh Vahidulla, Advocate for the Appellant.

CORAM: R.M.S.KHANDEPARKAR, J.

DATE: 20th JANUARY, 2006.

P.C.:

Heard the Advocate for the Appellant.

2. Since common questions of fact and law are involved, both the appeals are being heard together and disposed of by this common order.

3. The Appellant challenges the Order dated 26th August, 2005 in C.M.A. 92/05/A and C.M.A. 93/05/A in Special Civil Suit No.17/03/A passed by the Civil Judge S.D. at Bicholim. By the impugned Order the application for condonation of delay in filing the application for setting aside the Decree as well as the application filed under Order 9, Rule 13 of C.P.C. have been dismissed.

4. The undisputed facts are that the appellant herein was duly served with the summons in Special Civil Suit in Special Civil Suit No. 17/03/A before the Civil Judge S.D., Bicholim and even had filed written statement on 19th August, 2003. However, it appears that thereafter the appellant did not appear in the suit and it proceeded ex-parte. Consequently ex-parte decree came to be passed on 31st July, 2004.

5. It is the case of the appellant that on account of the failure on the part of his Advocate to attend the court proceedings on his behalf, the suit proceeded ex-parte and he had no knowledge about the decree passed in the matter. It was only on intimation to him by his Advocate on 13th June, 2005 that he came to know about the decree having been passed on 31st July, 2004. Consequently, he filed an application for certified copy of the decree. The same was filed on 29.6.05 and on the certified copy thereof being made available to the appellant, the application for setting aside the

ex-parte decree was filed on 31st July, 2005 along with the application for condonation of delay. However, the trial Court dismissed both the applications by the impugned order on the ground of failure on the part of the appellant to explain the delay during the period from the date of passing of the decree till 29.6.05, the date on which the appellant claimed to have acquired the knowledge of the decree.

6. Relying upon the decision of the Division Bench of this Court in ***Bapurao Sakharam Karmarkar v. Sadhu Bhivba Gholap*** reported in A.I.R. 1923 Bombay 193, the learned Advocate appearing for the appellant stated that since the appellant had no knowledge of the decree, the period required to be justified should be counted from the date of the knowledge of the decree and not prior to that date and that is the import of Article 123 of the Limitation Act.

7. The trial Court while dismissing the applications has clearly observed that the period of limitation for setting aside the decree passed ex-parte would be the date of decree and not the date when the applicant had knowledge of the said decree and if there was no service of summons against the applicant, time would begin to run against him for the purpose of making an application for setting aside the ex-parte decree from the date he comes to know about the ex-parte decree passed against him. Indeed,

bearing in mind Article 123 of the Limitation Act, 1963 which corresponds to Article 164 and Art. 9 of the Indian Limitation Act 1908, no fault can be found with the finding arrived at by the trial Court. Once it is not in disputed that the appellant was duly served with summons in the suit, he having chosen to remain absent and to contest the proceedings and consequently the suit having proceeded ex-parte, thereafter he cannot take advantage of his own failure to remain present before the Court at the time of passing of the decree. In cases where a party is not serve0d with summons and inspite of that the court proceeds to pass an ex-parte decree, certainly in those cases the party would be justified in claiming the limitation period from the date of knowledge of the decree. Same proposition will not apply in cases where the party is duly served with summons and remains absent during the proceedings and allows the Court to pass an ex-parte decree. In such cases the period of limitation will start from the date of passing of the decree itself.

8. Undisputedly, in the case in hand, the appellant was duly served with summons and had filed written statement though he chose to remain absent and consequently the ex-parte decree came to be passed. Undisputedly, the appellant had not explained the delay from the date of passing the decree till 13th June, 2005, the date on which the appellant claims to have acquired knowledge of the decree. Being so, no fault can be found with the said

finding arrived by the trial Court while dismissing the application for condonation of delay. Consequently the application for setting aside the decree was also liable to be dismissed and has been rightly dismissed by the trial Court.

9. The reported decision of this Court in the matter of ***Bapurao's*** case does not help the appellant in any manner. In that case the applicant was not served with summons and absolutely had no knowledge of the court proceedings and he came to know about the decree after it was passed. The observations made therein are squarely in the circumstances of the said case which were totally different from the facts of the case in hand.

10. In the circumstances, therefore, there is no case for interference in the impugned order and therefore both the appeals are dismissed.

R.M.S. KHANDEPARKAR, J.

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